No. 86-1333

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL ELEVATOR INDUSTRY, INC.,
Petitioner,

v.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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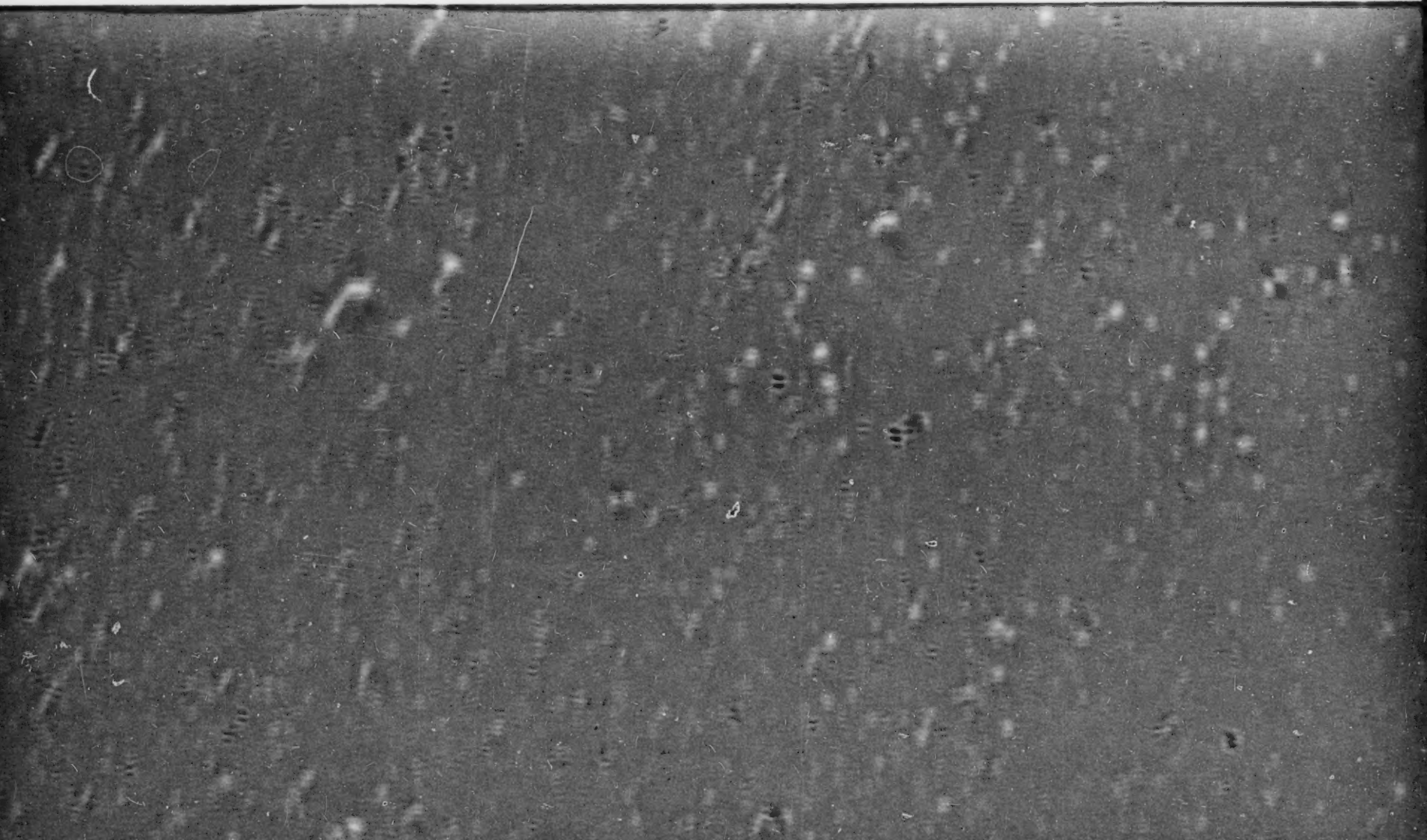

QUESTION PRESENTED

Acting in asserted reliance on a provision in a collective bargaining agreement, employers in one locality reduced wage rates. On the union's grievance, an arbitrator determined that the agreement permitted the wage reduction. The award was confirmed by a court on the ground that it "draws its essence from the collective bargaining agreement" (*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597). The court thereupon dismissed the union's complaint, filed prior to the arbitration, which sought a nationwide injunction against wage reductions. Neither the arbitrator nor the court determined that the arbitration award was binding outside the locality in which the grievance was raised.

The question presented is whether either the court's order confirming the award, or its order dismissing the complaint for a nationwide injunction, bars another court from directing the arbitration of grievances challenging wage reductions at other locations.

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE [1]

In general, we accept the statement of the case by petitioner, National Elevator Industry, Inc. ("NEII"). It may aid the Court, however, for us to set forth the facts which bear most directly on the questions sought to be presented by petitioner.

1. The Goldberg Award and Its Confirmation.

Article V of the Standard Agreement between NEII and respondent, International Union of Elevator Constructors, AFL-CIO ("IUEC"), provides a formula whereby wages in each locality are to be determined on the

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[1] Throughout this brief, "Pet." will refer to the Petition for a Writ of Certiorari and "Pet. App." will refer to the Appendix thereto.

basis of the collectively bargained compensation of four other building and construction trades in that locality. In August 1983, NEII sought to impose a wage reduction in Cedar Rapids, Iowa. The IUEC contended that the formula permitted only increases and not decreases. The IUEC filed a grievance under the arbitration clause of the agreement and filed suit in the United States District Court for the Southern District of New York, praying for a temporary injunction to block the wage cut pending arbitration of the grievance and for a permanent nationwide injunction barring NEII from decreasing the wage rate in Cedar Rapids or in any other location in the United States. (Pet. App. 48a.) The District Court (Lowe, J.) refused to enjoin the wage increase pending arbitration; she did not rule on the request for permanent relief (Pet. App. 50a).

On April 23, 1984, Arbitrator Stephen B. Goldberg issued his Award. Arbitrator Goldberg framed the issue before him as follows:

> The central issue presented by this case is whether the Employers were authorized by Article V of the 1967 Agreement, as carried forward into the 1982 Agreement, to decrease the Cedar Rapids wage rate on the basis of the four highest paid building trades in the Cedar Rapids area. [Pet. App. 70a.]

Arbitrator Goldberg determined, on the basis of his interpretation of the agreement, that the Employers were authorized to decrease the Cedar Rapids wage rate. Accordingly, his award was "The grievance is denied." (Pet. App. 51a, 79a). NEII thereupon filed a motion, in the suit which had been filed by IUEC, to confirm the award and for summary judgment dismissing the IUEC's complaint for a permanent injunction against wage reduction in Cedar Rapids or in any other location in the United States. The IUEC cross-moved to vacate the award and for summary judgment on its complaint for a permanent nationwide injunction against wage decreases.

On August 29, 1984, the District Court (Goettel, J.) granted NEII's motion to confirm and denied IUEC's motion to vacate. *International Union of Elevator Constructors, AFL-CIO* v. *National Elevator Industry, Inc.*, 590 F. Supp. 1218. In his opinion, Judge Goettel first ruled that the legal standard to be applied in reviewing the arbitrator's findings is that of *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960):

> Thus, in considering the motions to confirm or to vacate the findings of the arbitrator, the Court may only decide whether the findings draw their essence from the agreement under which the arbitrator based his authority. [590 F. Supp. at 1220.]

Judge Goettel then determined, on the basis of his examination of the contract and the award, that Arbitrator Goldberg's findings did draw their essence from the collective bargaining agreement (*id.*). Thereupon, Judge Goettel concluded:

> For the reasons outlined above, the findings of Arbitrator Stephen B. Goldberg are confirmed and the motion of the IUEC to vacate those findings are denied. The defendant will enter judgment accordingly. [*Id.* at 1221.]

Thereafter, Judge Goettel ordered, adjudged and decreed that:

> 1. Plaintiff's [IUEC's] motion to vacate said arbitration award be and hereby is DENIED.
>
> 2. Plaintiff's motion for summary judgment in this action be and hereby is DENIED.
>
> 3. Defendant's [NEII's] motion to confirm said arbitration award be and hereby is GRANTED.
>
> 4. Because said arbitration award has been confirmed the plaintiff's complaint be and hereby is DISMISSED. [App. 81a.]

The Court of Appeals affirmed without opinion (Pet. App. 82a), and this Court denied certiorari (106 S.Ct. 67 (1985)).

2. The Present Litigation.

In March and May of 1985, NEII, asserting Article V, reduced the wage rates of elevator mechanics in Houston and Dallas, Texas, respectively. Separate grievances were filed, invoking arbitration of the legality of the decreases under the agreement. NEII then brought the present action in the United States District Court for the Southern District of Texas seeking to enjoin these arbitrations; IUEC filed a counterclaim to compel arbitration of the Houston and Dallas wage reductions. The District Court (DeAnda, J.) ordered, *inter alia*, that the IUEC was entitled to summary judgment and an order compelling arbitration. (Pet. App. 10a.) In his Memorandum Opinion (Pet. App. 3a-9a), Judge DeAnda concluded as follows:

1. The scope of Arbitrator Goldberg's Award was limited to the Cedar Rapids wage reduction (Pet. App. 6a-7a).

2. Arbitrator Goldberg's Award does not bar abritration of the Houston and Dallas wage reductions (Pet. App. 7a-8a).

3. Arbitration is not barred by the *res judicata* effect of Judge Goettel's decisions confirming the Arbitrator's Award and denying a permanent injunction against the wage reduction (Pet. App. 8a-9a).

The Court of Appeals for the Fifth Circuit affirmed "for the reasons assigned in the District Court's Order of April 17, 1983 . . ." (Pet. App. 1a-2a).[2]

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[2] Subsequently, on December 29, 1986, Arbitrator Howard LeBaron sustained IUEC's grievance that the Dallas reduction was not authorized by the Agreement. On March 6, 1987, Arbitrator John Owen heard the Houston grievance; his award has not yet issued.

REASONS FOR DENYING THE WRIT

Petitioner seeks to bring before this Court two questions: first, whether Judge Goettel's order confirming the Goldberg Award bars arbitration of the Houston and Dallas grievances and, second, whether his order dismissing the union's complaint, insofar as it sought a nationwide injunction, bars such arbitration. The decision of both courts below that neither of these rulings bars the arbitration is clearly correct. Neither question raises an issue warranting review under the criteria delineated in Rule 17 of this Court's rules.

1. The Asserted Preclusive Effect of Judge Goettel's Order Confirming the Award.

A. In an effort to suggest a conflict between the decision below and decisions of this Court, Petitioner asserts:

> The effect of the Fifth Circuit's summary affirmance herein is that the IUEC is permitted to challenge an award in a second arbitration even though that award was judicially confirmed. Clearly, this is contrary to the intent of *Steelworkers* v. *Enterprise Wheel & Car Corp.*, [363 U.S. 593 (1960)]; and *W.R. Grace & Co.* v. *Rubber Workers* [461 U.S. 757 (1983)]. [Pet. 15.]

This argument is entirely invalid. It depends on using the word "challenge" in two materially different senses (Pet. 14-15):

(1) A "challenge" of an award in a judicial review or enforcement proceeding as exemplified by *Enterprise*, seeks to set aside the result reached by the arbitrator;

(2) on the other hand, a "challenge" of an award in a subsequent arbitration—such as was involved in *W.R. Grace*—does not seek to upset the result of the first award but asks the second arbitrator, in resolving a separate grievance, to reach a different conclusion with respect to the meaning of the agreement.

Respondent IUEC challenges the Goldberg award only in the second sense—that is, we seek to persuade arbi-

trators, in resolving the Houston and Dallas wage reduction grievances, that Article V does not permit those wage reductions. IUEC does *not* seek to change the result of the Goldberg arbitration—that is, we do not seek to upset the Cedar Rapids wage reduction. *W.R. Grace* holds that a "challenge" in the second sense *is* permissible, unless the parties' *agreement* requires future arbitrators to follow the first arbitrator's interpretation, and holds further that the question whether the agreement does so require is for the arbitrator. (461 U.S. at 764-766.) Judicial confirmation of the first arbitrator's award does not change this result; indeed, petitioner's contention that these types of "challenge" are mutually exclusive fails to take account of the restrictive standard of review which was established in *Enterprise* and reaffirmed in *W.R. Grace* (461 U.S. at 764-765). Judicial enforcement of an award establishes only that the award "draws its essence from the collective bargaining agreement" (*Enterprise*, 363 U.S. at 567). Since, under this standard enforcement is required "regardless of what [the court's] view might be of [the arbitrator's] contractual interpretation" (*W.R. Grace*, 461 U.S. at 765), such enforcement does not establish that the opposite interpretation is not "correct" or could not likewise "draw its essence from the collective bargaining agreement". Accordingly, in *W.R. Grace*, where the second arbitrator (Barrett) had disagreed with the first arbitrator (Sabella), this Court, in enforcing the Barrett award, "disagree[d] with the [Court of Appeals'] initial premise that the validity of the Sabella award is relevant." (*Id.* at n. 7.)

In reviewing Arbitrator Goldberg's award in this case, Judge Goettel applied the *Enterprise* standard; he noted that Arbitrator "Goldberg quite properly looked to the history of the agreement and found that the use of the word 'increase' was not in any way intended to bar decreases", and held ultimately that the Goldberg award

"draws its essence" from the Standard Agreement. (590 F. Supp. 1220, quoted at Pet. 19). Petitioner correctly states that these holdings "are binding upon the parties" (*id.*) but, as shown earlier, they do not establish that a second arbitrator, looking at the same agreement, is not free to determine that the bargaining history is irrelevant (or to disagree with Arbitrator Goldberg's assessment of that history), or, for some other reason, to conclude that Article V *does* "bar decreases". Thus, petitioner errs when it says that "IUEC's attempt to obtain a second and third arbitration of what is concededly the same dispute, is an impermissible collateral attack on that award and the judgment of the federal court confirming the award." (*Id.*)

B. In the present action, Judge DeAnda recognized that "confirmation of the [arbitrator's] award is not an affirmation that the award represents the correct resolution of the dispute" (Pet. App. 8a, citing Judge Goettel's explication of the standard of review). It was on this basis that he determined: "The District court's decision confirming the award and denying a permanent injunction against the wage reduction is not *res judicata* in this case because its scope is limited to the scope of the arbitrator's award." (*Id.*) Accordingly, as petitioner says, "Judge DeAnda held that since the scope of the award was limited to Cedar Rapids, Judge Goettel's judgment confirming that award was similarly limited" (Pet. 17, citing Pet. App. 8a-9a). Petitioner disagrees with that holidng only on the basis "that Judge DeAnda erred in concluding that Goldberg's award was limited to Cedar Rapids" (Pet. 17). In support of this claim of error (*id.* 18-19), petitioner does not—and cannot—point to anything in Judge Goettel's opinion which constitutes a ruling that the scope of the Goldberg award extended beyond the Cedar Rapids grievance. Rather, petitioner perforce confines itself to arguing that Judge DeAnda himself misinterpreted the Goldberg award in this respect.

The first question presented by the petitioner thus comes down to the claim that the District Court, and the unanimous Court of Appeals in adopting the District Court's reasoning, have erred in interpreting a particular arbitration award. Plainly, such a contention does not raise an issue of general importance which merits this Court's attention.

2. The Asserted Preclusive Effect of Judge Goettel's Order Dismissing IUEC's Complaint.

Petitioner's second question presented seeks further review of Judge DeAnda's ruling, affirmed by the Court of Appeals, that Judge Goettel's dismissal of the IUEC complaint for a nationwide injunction against wage reductions does not, as a matter of *res judicata*, bar arbitration of the Houston and Dallas wage reduction grievances. That ruling was clearly correct, and petitioner's contention that it conflicts with decisions in other circuits disregards the critical difference between those cases and the present one.

As Petitioner says, Judge Goettel dismissed IUEC's complaint "*because* he confirmed the Goldberg award which expressly held that such reductions were authorized by the Standard Agreement." (Pet. 20, emphasis in original.) In that complaint, the IUEC had sought a preliminary and permanent injunction against the wage reduction in Cedar Rapids or "*in any other location in the United States*" (Pet. 5, emphasis in original). IUEC would have been entitled to that relief only if the court were to rule that no arbitrator could properly conclude that the Agreement permits a wage reduction. Once Judge Goettel had determined, in confirming the Goldberg award with respect to the Cedar Rapids grievance, that an arbitrator *could* properly so determine, so that the Cedar Rapids wage reduction could go into effect, it necessarily followed that the IUEC was not entitled to an injunction against the reduction "in any other location * * * ." But, for the reasons discussed at pp. 6-7, *supra*, Judge Goettel's conclusion that the Goldberg award

was *a* permissible interpretation of the Agreement did not carry with it the proposition that it was the *only* permissible interpretation of the Agreement. By a parity of reasoning, the refusal to grant IUEC a nationwide injunction against wage reductions is not a judgment—expressly or implicitly—that the NEII is entitled to impose such a reduction beyond Cedar Rapids. It means only that the court will not interfere with either party's right under the agreement to have the propriety of wage reductions at other locations—if imposed by the employers and challenged by the union—determined by arbitration.

Moreover, because the denial of the injunction was due to the confirmation of the award, rather than to any determination concerning the scope of the Goldberg award, that order did not foreclose the courts below from concluding, as they did, that the scope of the award was limited to Cedar Rapids. It is in this critical respect that the present case differs from the decisions of the Fourth and Eleventh Circuits which petitioner asserts are in conflict with the ruling below: *S.C. Stevedores Ass'n* v. *Local 1422, ILA*, 765 F.2d 422 (C.A. 4, 1985) and *S.E.L. Maduro (Fla.) Inc.* v. *ILA*, 765 F.2d 1057 (C.A. 11, 1985). For there, the same courts which confirmed the arbitration award—which was rendered by a Special Emergency Hearing Panel ("EHP") under the Containerization Agreement of the ILA Master Contract—had expressly determined that that award was binding on all ports, although it had been rendered in disposing of a grievance arising out of a single port, Galveston.[3] The Second Circuit ruled:

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[3] The issue had arisen because employer associations from ports in regions other than Galveston had objected to being joined as defendants in the ILA's action to confirm the EHP's award. It is, of course, unremarkable that, under one agreement an award arising out of a dispute at a single location has a nationwide effect whereas, under a different agreement between other parties, an award arising out of a grievance in one location is binding only there. (Cf. *W.R. Grace, supra*, 461 U.S. at 765 quoted at p. 6, *supra*.)

> the award purported to be a decision based on the Master Contract. All of the respondents are parties to the Master Contract. Thus, the EHP decision, if valid, would be binding against all of the respondents. The district court did not err in confirming the award against them. *The decision of the EHP is binding on all ports governed by the Master Contract.* ([Unpublished Slip Op. at p. 3, *International Longshoremen's Association* v. *West Gulf Maritime Association*, 765 F.2d 135 (C.A. 2 1985), *affirming* 594 F.Supp. 670 (S.D.N.Y. 1984), emphasis added.])

The Fourth Circuit quoted the emphasized sentence, 765 F.2d at 423, and the Eleventh Circuit quoted the entire passage from the Second Circuit's opinion, 765 F.2d at 1059, n. 3. Those courts correctly recognized that this holding precluded arbitrations concerning the same question arising at other ports. But the decisions of the Fourth and Eleventh Circuits in the ILA litigation are not in point in the present case because the courts which confirmed the Goldberg award made no rulings concerning its scope and therefore did not preclude Judge DeAnda's consideration of that issue.

CONCLUSION

For the foregoing reasons, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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